No. 94-1592

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Petitioners,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILROAD COMPANY, *et al.*,

and

FEDERICO PENA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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for the Seventh Circuit**

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The petitioners, pursuant to Rule 15.7 of this Court's rules, hereby supplement their petition for a writ of certiorari as follows:

Subsequent to filing the petition, certain railroads filed a petition for review in the U.S. Court of Appeals for

the District of Columbia Circuit, seeking a decision on the exact underlying legal question presented to this Court in the undersigned's petition for a writ of certiorari. That is the third circuit court which has been asked to rule on the same issue. A copy of that petition is attached hereto as an Appendix.

In view of the above, we submit this as a further reason to grant the petition.

Respectfully submitted,

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May 9, 1995

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-1238

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO.
920 S.E. Quincy
Topeka, Kansas 66612

BURLINGTON NORTHERN RAILROAL CO.
3800 Continental Plaza
777 Main Street
Fort Worth, Texas 76102,

SOUTHERN PACIFIC TRANSPORTATION CO.
One Market Plaza
San Francisco, California 94105,

and

UNION PACIFIC RAILROAD CO.
1416 Dodge Street
Omaha, Nebraska 68179,
Petitioners,

v.

FEDERICO PEÑA
Secretary of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590,

DEPARTMENT OF TRANSPORTATION
400 Seventh Street, S.W.
Washington, D.C. 20590,

JOLENE M. MOLITORIS
Administrator
Federal Railroad Administration
400 Seventh Street, S.W.
Washington, D.C. 20590,

FEDERAL RAILROAD ADMINISTRATION
400 Seventh Street, S.W.
Washington, D.C. 20590,

and

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR REVIEW OF AGENCY ACTION BY THE FEDERAL RAILROAD ADMINISTRATION

Pursuant to 28 U.S.C. §§ 2342(7) and 2344, the Atchison, Topeka and Santa Fe Railway Company, Burlington Northern Railroad Company, Southern Pacific Transportation Company, and Union Pacific Railroad Company petition for review of final agency action by the Federal Railroad Administration (FRA), an agency within the Department of Transportation.[1] The FRA announced on March 1, 1995 that it will continue to enforce an interpretation of the Hours of Service Act, 49 U.S.C. §§ 21101-21107, 21303 (hereinafter HSA), against the Petitioners, even though it is collaterally estopped from asserting this interpretation against the Petitioners and the interpretation is contrary to the language and meaning of the statute.

Among the responsibilities of the FRA is the administration of the HSA, which imposes a twelve-hour limit on the time that train crews can continuously spend on-duty. 49 U.S.C. § 21103. Once a train crew has reached its twelve-hour maximum, it is relieved from further train operating duties, even if the train has not reached its final destination. The carrier then transports the relieved crew to a terminal and brings a relief crew to continue the train's journey. The transportation of a relieved crew back to its terminal is commonly referred to as deadhead transportation.

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[1] The Corporate Disclosure Statement required by Rule 26.1 of the Local Rules is attached hereto as exhibit B.

The HSA defines various time periods as on duty or off duty for purposes of computing the twelve-hour maximum. Section 21103(b)(4), added by the 1969 amendments to the HSA, provides that time spent in deadhead transportation at the end of a crew's tour of duty is neither on- nor off-duty time, but is what has come to be known as limbo time. Limbo time counts against neither the twelve-hour maximum nor the time off duty which must accumulate before a crew can be given a new assignment. From the enactment of the 1969 amendments until 1992, the FRA consistently treated time spent waiting for deadhead transportation from an assignment to be part of deadhead transportation and therefore limbo time. *See Atchison T. & S. F. Ry. v. Peña*, 44 F.3d 437, 440 (7th Cir. 1994) (en banc) (petition for cert. filed Mar. 28, 1995).

Two unions which represent train crew members, the Brotherhood of Locomotive Engineers and the United Transportation Union, challenged the FRA's treatment of waiting time in two court actions which were consolidated in *United Transp. Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). Petitioners were not parties to this litigation, which involved the unions and FRA. The Ninth Circuit rejected the FRA's consistent interpretation of the HSA and held that time spent waiting for deadhead transportation was time on duty under the HSA. Although disagreeing with the Ninth Circuit's rationale, the FRA, by letter dated October 28, 1992, announced that it would apply the Ninth Circuit's interpretation nationwide effective January 1, 1993.

Most of the country's largest railroads, including the Petitioners here, filed a petition in the Seventh Circuit for review of the FRA's decision to apply the changed HSA interpretation nationwide. The court, sitting en banc, rejected the FRA's new interpretive rule. *Peña*, 44 F.3d at 443-44. The Seventh Circuit held that time spent waiting for deadhead transportation by a relieved crew was not time on duty.

On March 1, 1995, the FRA issued a letter to the nation's railroads advising them that it will follow the Seventh Circuit's interpretation in all states except those comprising the Ninth Circuit. Letter of S. Mark Lindsay, Chief Counsel, March 1, 1995, at 3 (attached as Exhibit A). In the Ninth Circuit states, the FRA announced that it would continue to treat waiting time as time on duty and directed railroads operating in the Ninth Circuit, including Petitioners, to continue to report instances to FRA where train crews exceeded the twelve-hour maximum as a result of that treatment. *Id.*

The FRA's decision to impose the changed interpretation of the HSA on Petitioners in the Ninth Circuit is unlawful, because Petitioners and the FRA already litigated this issue in the Seventh Circuit and the FRA lost. The doctrine of mutual collateral estoppel prevents the Government from reasserting an issue against persons, who were parties to prior litigation with the Government, where that same issue was decided contrary to the Government and in favor of those persons, as in *Peña*. *United States v. Stauffer Chemical Co.*, 464 U.S. 164, 169-72 (1984). In contrast, the Ninth Circuit decision in *United Transp. Union v. Skinner* has no preclusive effect against the Petitioners, because they were not parties to that litigation. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 (1979).

The FRA's March 1, 1995 action is also arbitrary and capricious and contrary to law.

The FRA's March 1, 1995 letter constitutes final agency action which has aggrieved the Petitioners and thus is reviewable under 28 U.S.C. §§ 2342(7) and 2344. The action is definitive, leaving no doubt regarding the interpretation of the HSA that the FRA will apply to the Petitioners in Ninth Circuit states. In the absence of a finding of invalidity, that interpretation will continue to have a direct and immediate adverse impact on the Petitioners. Indeed, the FRA has assessed penalties against

Petitioners for alleged violations of the HSA, based on its changed interpretation.

Venue is proper in this Court pursuant to 28 U.S.C. § 2343, which allows an appeal against FRA in the District of Columbia Circuit.

Therefore, the Petitioners request that, as to them, the Court enter an order that the FRA follow the HSA, as interpreted in *Peña*, in all Circuits, including the Ninth. Similarly, the Petitioners request that the Court suspend, modify or vacate that portion of the FRA's March 1, 1995 action which purports to apply to the Petitioners an interpretation of the HSA other than that adjudicated in *Peña*.

Respectfully submitted,

/s/ Ronald M. Johnson, P.C.
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Attorneys for Petitioners The Atchison, Topeka and Santa Fe Railway Company, Burlington Northern Railroad Company, Southern Pacific Transportation Company, and Union Pacific Railroad Company

April 28, 1995

RULE 26.1
CORPORATE DISCLOSURE STATEMENT

1. The Atchison, Topeka and Santa Fe Railroad Company's parent companies are Santa Fe Pacific Corporation and SFP Properties, Incorporated. The subsidiaries of The Atchison, Topeka and Santa Fe Railway Company, of Santa Fe Pacific Corporation, or of SFP Properties, Incorporated, other than those wholly owned by them, are:

Alameda Belt Line;
Belt Railway Company of Chicago;
Central California Traction Company;
Houston Belt & Terminal Railway Company;
Kansas City Terminal Railway Company;
Oakland Terminal Railway Company;
St. Joseph Terminal Railroad Company;
Sunset Railway Company;
Texas City Terminal Railway Company; and
Wichita Union Terminal Railway Company.

There are no affiliates which have issued shares or debt securities to the public.

2. Burlington Northern Railroad Company's parent company is Burlington Northern, Incorporated. The subsidiaries of Burlington Northern Railroad Company or of Burlington Northern, Incorporated, other than those wholly owned by them, are:

The Belt Railway Company of Chicago;
Camas Prairie Railroad Company;
Davenport, Rock Island and North Western Railway Company;
Houston Belt & Terminal Railway Company;
Iowa Transfer Railway Company;
Kansas City Terminal Railway Company;
Keokuk Union Depot Company;
Longview Switching Company;
M T Properties, Inc.;

Northern Radio Ltd.;
Paducah & Illinois Railroad Company;
Portland Terminal Railroad Company;
Terminal Railroad Association of St. Louis;
TTX Company; and
The Wichita Union Terminal Railway Company.

There are no affiliates which have issued shares or debt securities to the public.

3. Southern Pacific Transportation Company's parent company is Southern Pacific Rail Corporation. The subsidiaries of Southern Pacific Transportation Company or of Southern Pacific Rail Corporation, other than those wholly owned by them, are:

The Alton & Southern Railway Company;
Arkansas & Memphis Railway Bridge and Terminal Company;
Central California Traction Company;
Denver Union Terminal Railway Company;
Kansas City Terminal Railway Company;
The Ogden Union Railway & Depot Company;
Portland Terminal Railroad Company;
Portland Traction Company;
San Marco Pipeline Company
Southern Illinois and Missouri Bridge Company;
Sunset Railway Company;
Terminal Railroad Association of St. Louis; and
TTX Company.

There are no affiliates which have issued shares or debt securities to the public.

4. Union Pacific Railroad Company's parent company is Union Pacific Holdings Corporation, whose parent is Union Pacific Corporation. The subsidiaries of Union Pacific Railroad Company or of Union Pacific Corporation, other than those wholly owned by them, are:

Alameda Belt Line;
The Alton and Southern Railway Company;

Arkansas & Memphis Railway Bridge and
Terminal Company;
Automated Monitoring & Control International;
The Belt Railway Company of Chicago;
Brownsville & Matamoros Bridge Company;
Camas Prairie Railroad Company;
Central California Traction Company;
The Denver Union Terminal Railway Company;
Houston Belt & Terminal Railway Company
Kansas City Terminal Railway Company;
Longview Switching Company;
Oakland Terminal Railway;
The Ogden Union Railway & Depot;
Portland Terminal Railway Company
Portland Traction Company;
St. Joseph Terminal Railroad Company;
Terminal Railroad Association of St. Louis;
Texas City Terminal Railway Company;
TTX Company; and
Wichita Union Terminal Railway Company.

There are no affiliates which have issued shares or debt securities to the public.